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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	WT Docket No. 99-217
Notice of Inquiry,	)	
Promotion of Competitive Networks in Local	)	
Telecommunications Markets	)	
	)	
To: The Commission	)	

COMMENTS OF THE NATIONAL LEAGUE OF CITIES, ALABAMA LEAGUE OF MUNICIPALITIES, ALASKA MUNICIPAL LEAGUE, LEAGUE OF ARIZONA CITIES AND TOWNS, ARKANSAS MUNICIPAL LEAGUE, LEAGUE OF CALIFORNIA CITIES, COLORADO MUNICIPAL LEAGUE, CONNECTICUT CONFERENCE OF MUNICIPALITIES, DELAWARE LEAGUE OF LOCAL GOVERNMENTS, FLORIDA LEAGUE OF CITIES, GEORGIA MUNICIPAL ASSOCIATION, ASSOCIATION OF IDAHO CITIES, ILLINOIS MUNICIPAL LEAGUE, INDIANA ASSOCIATION OF CITIES AND TOWNS, IOWA LEAGUE OF CITIES, LEAGUE OF KANSAS MUNICIPALITIES, KENTUCKY LEAGUE OF CITIES, INC., LOUISIANA MUNICIPAL ASSOCIATION, MAINE MUNICIPAL ASSOCIATION, MARYLAND MUNICIPAL LEAGUE, MASSACHUSETTS MUNICIPAL ASSOCIATION, MICHIGAN MUNICIPAL LEAGUE, LEAGUE OF MINNESOTA CITIES, MISSISSIPPI MUNICIPAL LEAGUE, MISSOURI MUNICIPAL LEAGUE, MONTANA LEAGUE OF CITIES AND TOWNS, LEAGUE OF NEBRASKA MUNICIPALITIES, NEVADA LEAGUE OF CITIES, NEW HAMPSHIRE MUNICIPAL ASSOCIATION, NEW JERSEY STATE LEAGUE OF MUNICIPALITIES, NEW MEXICO MUNICIPAL LEAGUE, NEW YORK STATE CONFERENCE OF MAYORS AND MUNICIPAL OFFICIALS, NORTH CAROLINA LEAGUE OF MUNICIPALITIES, NORTH DAKOTA LEAGUE OF CITIES, OHIO MUNICIPAL LEAGUE, OKLAHOMA MUNICIPAL LEAGUE, LEAGUE OF OREGON CITIES, PENNSYLVANIA LEAGUE OF CITIES AND MUNICIPALITIES, RHODE ISLAND LEAGUE OF CITIES AND TOWNS, MUNICIPAL ASSOCIATION OF SOUTH CAROLINA, SOUTH DAKOTA MUNICIPAL LEAGUE, TENNESSEE MUNICIPAL LEAGUE, TEXAS MUNICIPAL LEAGUE, UTAH LEAGUE OF CITIES AND TOWNS, VERMONT LEAGUE OF CITIES AND TOWNS, VIRGINIA MUNICIPAL LEAGUE, ASSOCIATION OF WASHINGTON CITIES, WEST VIRGINIA MUNICIPAL LEAGUE, LEAGUE OF WISCONSIN MUNICIPALITIES, AND WYOMING ASSOCIATION OF MUNICIPALITIES

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Dated: October 12, 1999

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SUMMARY

The NOI seeks comment on two issues -- right-of-way (ROW) management and compensation, and local taxes -- that lie at the very heart of the functions performed by NLC members for their residents. Each local government's ROW and tax policies are the product of applicable state and local law and its own unique infrastructure needs and municipal budgetary requirements. Consequently, the facts and circumstances concerning each community's ROW and tax requirements can only be meaningfully addressed on a case-by-case basis. The Commission should therefore recognize that any "facts" compiled here cannot be applied generally, nor can they furnish a reliable basis for any Commission action or conclusion about the particular ROW or tax requirements of any given community.

ROW Management and Compensation.

NLC finds the ROW NOI troubling in several respects. First, the NOI fails to recognize that in the 1996 Act, Congress deliberately withheld §253(c) management and compensation disputes from Commission jurisdiction, preferring that they be resolved by the courts. Regardless whether the ROW portion of the NOI steps impermissibly beyond that jurisdictional boundary, the line drawn by Congress certainly counsels the Commission to proceed with caution. Any general pronouncements here by the Commission about the wisdom or legality of a particular local ROW requirement would overlook Congress' determination that those requirements are based on unique and varying local circumstances, and are therefore simply not amenable to any "one-size-fits-all" generalizations by the Commission.

Second, the NOI's description of court precedent construing § 253 is disturbingly one-sided and incomplete. For instance, the Prince George's County court's view that "compensation" under § 253(c) is limited to costs is clearly the minority view among courts that have addressed the issue. Moreover, the NOI's seeming approval of the view that resellers and

UNE purchasers should be exempted from ROW compensation requirements is at odds with the NOI's stated preference for facilities-based competition. Exempting resellers and UNE purchasers in this manner favors non-facilities-based entry over facilities-based entry.

Overall, it is simply far too early for the Commission to be making any reliable pronouncements about how § 253 will be construed by the courts. And given the Commission's limited jurisdiction over ROW issues, it is difficult to see what purpose is served by the NOI's discussion of court precedent to date.

Third, the NOI fails to take note of available data -- much of it from the Commission -- establishing the explosive growth of competitive facilities-based providers and standing as powerful proof that local ROW requirements are posing no obstacle to local competition. In the years since the 1996 Act, CLEC fiber deployment has far outstripped ILEC fiber deployment and now represents 16% of all local transmission capacity. Moreover, CLEC facilities-based entry has been most intense in major metropolitan areas, precisely where local ROW requirements also tend to be the most demanding. The conclusion is clear: Local ROW requirements are not hindering CLEC ROW use, either generally or in terms relative to ILEC ROW use.

State and Local Taxes.

Local governments have long recognized principles of tax equity. They realize that imposition of taxes that impede competition not only deprives their residents of the benefits of competition, but also deprives local governments of the broader tax base and increased tax revenue that flow from the demand-stimulating effects of competition.

At the same time, local governments face constantly increasing demands for the essential public services they provide. In our system of federalism, how each state and local taxing authority balances the fiscal demands placed upon it against taxpayers' understandable distaste for taxes is left to democratically-elected state legislatures and local councils and boards, not to distant, unelected agencies like the Commission. NLC is therefore gratified by the NOI's acknowledgement of the Commission's "extremely limited" authority in the area of local taxes.

Moreover, there is no rational basis to suggest that local taxes have impeded telecommunications competition in any way. All of the local tax examples offered by the wireless industry and recited in the NOI are generally applicable taxes, such as utility taxes, business license taxes, sales and use taxes, and property taxes. What the wireless industry really seeks is preferential tax treatment vis-à-vis other businesses generally, and its wireline competitors in particular.

The wireless industry's assault on local taxes is also belied by the phenomenal growth it is enjoying. Wireless industry revenue and subscribership are growing by leaps and bounds, and prices are declining. The data simply cannot be squared with the industry's assertions that state and local taxes are somehow inhibiting its growth or its ability to compete.

In sum, there is no evidence suggesting local ROW requirements or taxes are any impediment to the growth of local facilities-based competition. Moreover, the Commission's authority in these areas is, at best, exceedingly limited. Accordingly, the Commission should reject industry invitations to inquire into local ROW requirements and taxes.

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The National League of Cities ("NLC"), together with its member state municipal leagues representing municipalities in 49 of the 50 states, submit these comments in response to the two Notices of Inquiry ("NOI"), released July 7, 1999, in the above-captioned proceeding.

National League of Cities
October 12, 1999

NLC membership comprises approximately 1500 municipalities across the nation. In addition, NLC members include 49 state municipal associations which, in turn, represent an additional 18,000 municipalities within their states.

The NOI seeks comment on two issues of vital concern to the NLC and its members -- and, indeed, to all local governments and their residents nationwide: (1) right-of-way ("ROW") management and franchise fees (NOI at ¶¶ 70-80); and (2) state and local taxes (NOI at ¶¶ 81-84). Because these matters lie at the very heart of the functions performed by local governments for their residents, the NLC and its member state leagues file these comments.

INTRODUCTION

We appreciate that, by seeking comment on local ROW and tax issues, the Commission "do[es] not mean to imply" that these issues are "the principal impediments to facilities-based competition in local telecommunications markets." NOI at ¶ 1. We nevertheless find the NOI disturbing.

In particular, the NOI fails to recognize the limited utility of any record compiled in this proceeding. The limitations on the utility of the record complied here are both legal and practical.

From a legal standpoint, the law is clear that the Commission has little or no authority over the ROW management and compensation and state and local tax issues raised in the NOI. The NOI appears to recognize as much in the case of state and local taxes (NOI at ¶ 84), but not in the case of ROW management and compensation issues under § 253(c) (id. at ¶¶ 75-78).

Given the Commission's limited authority in these areas, we fear that the NOI will devolve into a forum for industry to use its superior resources to weight the record with one-sided examples. Such a skewed record would pose the risk that the NOI may culminate in some sort of Commission report or action that in turn would be used by industry before Congress and the courts. We respectfully urge the Commission not to allow itself to be used as an amplifier for the already dollar-amplified voices of industry in this manner. It should recognize that, without the benefit of an adjudicatory record involving the specific facts relating to a particular local ROW requirement or tax -- a benefit that an NOI proceeding is inherently not capable of providing -- drawing any conclusions here will be hazardous at best.

That brings us to the more practical limitations on the utility of any record compiled here. There are over 30,000 local governments across the nation. The authority of each with respect to ROW management and compensation and the imposition of taxes varies according to the requirements of applicable state laws and local charter requirements, which in turn vary widely themselves. Moreover, the local infrastructure needs and fiscal demands on municipal budgets that shape each local government's ROW management and compensation and tax policies will also vary considerably from community to community.

As a result, any attempt to draw generalized conclusions from the record here about either local ROW requirements or taxes would be anecdotal at best and therefore inherently unreliable. And even with regard to any anecdotes furnished, the Commission will have no assurance that it can rely on a one-sided description of the facts in a particular community. Yet that is all the Commission is likely to have unless each and every community that is the subject of any industry anecdote formally responds in this proceeding with its own version of the facts. But each such community is under no obligation to respond, nor should it be obligated to spend limited public resources to do so in a proceeding such as this, which is neither adjudicatory nor rulemaking in nature.

The conclusion should be obvious: the facts and circumstances concerning each community's ROW management and compensation requirements, as well as any local tax, can only be meaningfully addressed and resolved on a case-by-case basis. Indeed, the Commission has previously recognized as much.[1] Consequently, the Commission should recognize that any "facts" compiled in the record here cannot be applied generally, nor can they furnish a reliable basis for any Commission action or conclusion about the permissibility of the particular ROW or tax requirements of any given community.

Subject to these rather substantial caveats, we now turn to the issues raised in the NOI.

I. THERE IS NO LEGAL OR FACTUAL BASIS FOR ANY BROAD-BASED COMMISSION INQUIRY INTO LOCAL ROW MANAGEMENT OR COMPENSATION REQUIREMENTS.

While the NOI properly appears to recognize that most state and local governments are managing and receiving compensation for ROW in a procompetitive manner (NOI at ¶¶ 72 and 79), the ROW portion of the NOI nevertheless troubles NLC and its members in several respects. Chief among these are (1) the NOI's failure to recognize that § 253(d) gives the Commission no jurisdiction over ROW management and compensation disputes under §253(c); (2) the NOI's inaccurate and incomplete summary of court decisions to date under § 253; and (3) the NOI's failure to take note of available data -- much of it from the Commission -- establishing the mushrooming growth of competitive facilities-based providers and standing as powerful proof that, from a nationwide perspective (the only perspective the Commission can responsibly address in the NOI proceeding), local ROW management and compensation requirements pose no obstacle to local competition. We address each of these shortcomings of the NOI in turn.

A. In the 1996 Act, Congress Deliberately Withheld § 253(c) ROW Management and Compensation Disputes from Commission Jurisdiction.

A threshold question unaddressed in the NOI is the scope of the Commission's jurisdiction over the § 253(c) issues -- ROW management and compensation -- on which it seeks

[1] See, e.g., Public Notice, Suggested Guidelines for Petitions for Ruling under Section 253 of the Communications Act, FCC 98-295 at 2-3 (rel. Nov. 17, 1998)(§ 253(d) petitions must be based on specific facts surrounding the particular local requirement challenged); Pittencrieff Communications, 13 FCC Rcd 1735 (1997), pet. for review denied sub nom. CTIA v. FCC, 168 F.3d 1332 (D.C. Cir. 1999) (§ 332(c)(3) petitions must be based on particular facts).

comment. If, as NLC believes, the Commission has no jurisdiction over these issues, then obvious and fundamental questions arise about the jurisdictional basis of the NOI itself and, perhaps more to the point, what purpose any record developed here might serve. In fact, the Commission's authority under § 253(d) does not extend to disputes arising under § 253(c) concerning local ROW compensation or management. As both the language of § 253 and its legislative history make clear, Congress deliberately left such disputes exclusively to the courts.

We begin with the language of § 253. By its terms, § 253(d) gives the Commission jurisdiction to preempt state and local requirements that are inconsistent with § 253(a) or (b). Section § 253(c), however, is omitted from the ambit of the Commission's § 253(d) jurisdiction.

Congress' omission of § 253(c) from the authority given the Commission by § 253(d) was not accidental or a mere oversight. To the contrary, the legislative history makes plain that Congress intentionally withheld from the Commission jurisdiction over § 253(c) ROW management and compensation issues, preferring instead that such disputes be resolved by courts.

Section 253(d) was added in conference, based on Section 254 of S. 652, the Senate version of what became the 1996 Act.[2] In the Senate, Section 254(d), as originally proposed, gave the Commission jurisdiction over all barrier-to-entry disputes, including those involving ROW management and compensation under § 254(c) (what is now § 253(c)). After the narrow defeat of a proposed amendment by Senators Feinstein and Kempthorne that would have removed Commission preemption jurisdiction entirely, and after substantial debate on the Senate floor, a compromise amendment, offered by Senator Gorton (the "Gorton Amendment"), was adopted to curtail Commission jurisdiction over local ROW management and compensation

[2] H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 126-27 (1996). The House provision did not contain any preemption provision at all. Thus, the legislative history of § 253(d) must be found in the Senate bill, S. 652, rather than in the House.

matters. The Gorton Amendment, adopted by unanimous voice vote, revised subsection (d) to clarify that subsection (c) ROW disputes, unlike those under subsection (b), would not be subject to Commission jurisdiction authority under subsection (d).

Senator Gorton, the author of the successful compromise amendment, stated:

> There is no preemption. . . for subsection (c) which is entitled, "Local Government Authority," and which preserves to local governments control over their public right of way. It accepts the proposition from [Senators Feinstein and Kempthorne] that these local powers should be retained locally, that any challenge to them take place in the Federal district court in that locality and that the Federal Communications Commission not be able to preempt such actions.[3]

Senator Gorton added:

> Once again, the alternative proposal [the Gorton amendment] . . . retains not only the right of local communities to deal with their rights-of-way, but their right to meet any challenge on home ground in their local district courts.[4]

Thus, there can be no serious dispute that the Commission has no jurisdiction over the § 253(c) ROW management and compensation issues about which it seeks comment in the NOI. Regardless whether the ROW portion of the NOI steps impermissibly beyond that jurisdictional limitation, that limitation certainly counsels the Commission to proceed with caution in this area. Any general pronouncements here by the Commission about the wisdom or legality of any particular kind of local ROW management or compensation requirement would improperly intrude on matters Congress determined would be best left to the courts. Of equal importance, any such pronouncements would ignore the reason Congress made that determination: ROW management and compensation requirements are based on unique and varying local

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[3] 141 Cong. Rec. S. 8213 (Daily ed. June 13, 1995) (remarks of Sen. Gorton) (emphasis added).

[4] Id. at S. 8308 (remarks of Sen. Gorton) (Daily ed. June 14, 1995) (emphasis added). See also id. at S. 8306 (remarks of Sen. Gorton) (emphasis added) ("my [amendment] says that in the case of these purely local matters dealing with rights-of-way, there will not be jurisdiction on the part of the FCC to enjoin enforcement of these local ordinances").

circumstances, and are therefore simply not amenable to any "one-size-fits-all" generalizations at the federal level.

B. The NOI's Description of Court Precedent Construing § 253 Is Incomplete and, in Certain Respects, Inaccurate.

A significant portion -- indeed, the bulk -- of the ROW NOI (¶¶ 75-78) is devoted to a discussion of court precedent construing §253. Why the Commission chose to spend such a large part of the ROW NOI characterizing this court precedent is unclear, since the Commission has no greater expertise in interpreting these court decisions than other courts. We presume (and hope) that this discussion in the NOI is merely a regurgitation of the "persistent assertions" of the "several carriers and their associations" whose lobbying apparently prompted the NOI, and not any suggestion of the views of the Commission itself.[5] In any event, the NOI's lengthy discussion of court precedent compels the NLC to respond to set the record straight.

As an initial matter, it is important to note that two of the court decisions on which the NOI heavily relies -- the Prince George's County[6] and Austin[7]decisions -- are the subject of pending appeals. Since the courts of appeals will speak directly to the issues decided by the district courts in these cases, any reliance on those decisions for guidance at this point seems a bit premature.

Moreover, scrutiny of those cases and the other cases cited by the NOI reveals that these same Prince George's County and Austin decisions that are the subject of pending appeals also

[5] NOI at ¶ 79. The Commission should take care that is does not allow industry, through its informal and "persistent assertions," to use the Commission as a tool to create a "reverberation effect," through which the Commission's repetition of industry's assertions is then cited to courts by industry as support for those same allegations in industry's litigation with local governments. The Commission should make clear that, by recounting industry's "persistent assertions," it does not intend to place its imprimatur on those assertions.

[6] Bell Atlantic v. Prince George's County, 1999 WL 343646 (D. Md. May 24, 1999), appeal pending No. 99-1784 (4th Cir. filed June 14, 1999).

[7] AT&T Communications v. City of Austin, 975 F.Supp.928 (W.D. Tex. 1997), appeal pending No. 98-50672 (5th Cir. filed July 2, 1998).

just happen to be the lynchpin of virtually all of the propositions relating to ROW management and compensation recited in the NOI. Thus, for example, while the NOI cites both Prince George's County and the Dallas decisions[8] for the proposition that courts "have held that local governments may not impose fees, conditions, and franchise requirements on service providers . . . that do not use any public rights-of-way for their own facilities" (NOI at ¶ 77), in fact those decisions are nothing more than me-too applications of the Austin decision: the Dallas court relied almost entirely on the Austin decision in construing the meaning of "use" of rights-of-way, Dallas II, 1998 WL 386186 at *4-5, and the Prince George's County court likewise relied on the Austin decision in reaching the same conclusion, 1999 WL 343646 at *9-10.

While (as pointed out below) we disagree with many aspects of the decisions reached in Austin, Dallas and Prince George's County, our point here is not to denigrate those decisions. Rather, our point is merely that it is far too early to be drawing any general conclusions about how courts will ultimately resolve the issues presented by § 253(c), and to the extent that the NOI attempts to do otherwise, it does a disservice to the litigants who will be involved in pending and future § 253 cases.

Moreover, perhaps because it was based on industry's "persistent assertions" to the Commission, the NOI's characterization of the precedent it cites is disturbingly one-sided and incomplete. Thus, the NOI cites Prince George's County and Dallas I for the proposition that "courts have struck down [ROW] compensation schemes that they found were not reasonably related to carrier's right-of-way usage and the costs that use imposes on the local government

[8] AT&T Communications v. Dallas, 8 F.Supp. 582 (N.D. Tex. 1998) ("Dallas I"), 1998 WL 386168 (N.D. Tex. July 7, 1998) ("Dallas II"), and 1999 WL 324668 (N.D. Tex. May 17, 1999) ("Dallas III") (cited in NPRM at ¶¶ 76-77 & nn. 193-94 & 196-99).

and its citizens." NOI at ¶ 78. While Prince George's County did so hold,[9] the NOI inexplicably relegates the directly contrary holding in Dearborn to a mere footnote,[10] and then neglects to mention that one of the cases the NOI cites for another proposition, BellSouth Telecommunications v. City of Coral Springs, 42 F.Supp.2d 1304, 1309 (S.D. Fla. 1999) (cited in NOI at n. 195), upheld a gross revenue-based fee allowed by state law even though there was no suggestion that the fee was based on "costs" rather than "value" of the ROW.

To underscore the fragile and shifting nature of the legal propositions recited in the NOI, just six days after the NOI was issued, yet another district court explicitly disagreed with Prince George's County on the ROW compensation issue, siding instead with the Dearborn decision that the NOI curiously saw fit to dismiss in a footnote:

> This [Prince George's County] reading of "fair and reasonable compensation" may too severely limit the term. As the court in [Dearborn] noted, such a reading treats the 1996 Act as if it allowed recoupment of "costs" rather than gaining of "compensation." . . . . Moreover, the term "compensation" has long been understood to allow local governments to charge rental fees for public property appropriated to private commercial uses . . . . It is thus doubtful that Congress, by use of the words "fair and reasonable compensation," limited local governments to recovering their reasonable costs.[11]

In short, not one, but three different district courts have declined to adopt the Prince George's County view that "compensation" under §253(c) is limited to costs. Moreover, Prince

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[9] Contrary to the suggestion in the NOI, Dallas I held no such thing. While Dallas I found that imposition of the city's fee on AT&T violated § 253 because AT&T "used" very little right-of-way under the logic of the Austin case, it did not hold that "compensation" was limited to cost reimbursement. To the contrary, Dallas I noted that AT&T "already pays SWBT for its pro rata share of [gross receipts-based] franchise fees that SWBT pays to Dallas for its use of rights-of-way." 8 F. Supp. 2d at 593. The Dallas I court expressly declined to reach the issue of what would constitute a reasonable fee, but referred to "flat rate or percentage of revenue" fees as methods contemplated by § 253(c), id. at 594.

[10] NOI at n. 200 (citing TCG Detroit v. City of Dearborn, 16 F. Supp. 2d 785 (E.D. Mich. 1998), appeal pending Nos. 98-2034 and 98-2035 (6^{th} Cir.)).

[11] Omnipoint Communications v. Port Authority of New York and New Jersey, 1999 WL 494120 at *6 (S.D.N.Y. July 13, 1999) (citations omitted).

George's County stands alone in this regard, because contrary to the suggestion in the NOI, the Dallas court never held that compensation was limited to costs. See note 9 supra.

The NOI's heavy reliance on Prince George's County is therefore curious at best, and at worst misleading. The defects in that court's, as well as the Dallas and Austin courts' analysis of § 253 are many. Those defects are pointed out in NLC's amicus brief filed in the Fourth Circuit appeal of Prince George's County. Rather than repeating the arguments in NLC's amicus brief here, we refer the Commission to that brief, which is attached hereto as Attachment A and incorporated herein by reference.

Two propositions in the NOI, however, do merit a special response, because the NOI seems unaware that one is inconsistent with the NOI's professed desire to promote facilities-based competition, and the other is at odds with Commission precedent construing § 253(a).

First is the NOI's seeming approval of the Austin, Dallas and Prince George's County rulings that resellers, UNE purchasers and wireless providers whose traffic traverses ROW facilities owned by others nevertheless do not "use" ROW within the meaning of § 253(c) and thus may not be required to pay compensation for use of ROW. NOI at ¶ 77. Aside from the legal infirmities of this construction of the term "use,"[12] these rulings, if applied in a local jurisdiction that assesses gross revenue-based franchise fees, would actually undermine the Commission's goal of promoting facilities-based competition. Exempting resellers and UNE purchasers from gross revenue-based franchise fees favors non-facilities-based entry over facilities-based entry because CLECs will invariably pay less (or no) franchise fees by using an ILEC's ROW facilities than either the ILEC would pay for using those same ROW facilities, or the CLEC would pay if it built its own ROW facilities to serve customers.

[12] See Attachment A at 12-16.

An example will prove the point. Suppose a local government imposes a 4% franchise fee for ROW use, and suppose further that, under Austin and its progeny, the local government is prohibited from imposing any fee on resellers, UNE purchasers or wireless providers that lease or otherwise make use of the ILEC's ROW facilities to provide service. For simplicity, also suppose that, on a per-subscriber basis, the ILEC's average wholesale price to CLECs (the average of its resale and various UNE prices to CLECs) is 80% of the CLEC's retail price of service, so that for every \$100 worth of retail revenue earned by CLECs, \$80 represents the wholesale price they must pay to the ILEC.

Under this scenario, the ILEC would pay \$4 in ROW compensation for every \$100 in retail revenue from its own end-use customers. Because the ILEC would receive only \$80 in wholesale revenue from a comparable volume of wholesale sales to resellers and UNE purchasers, only \$3.20 in ROW compensation would be paid by the ILEC on those sales, and the CLEC would pay nothing. Thus, for every \$100 worth of retail revenue generated by CLECs from resale or UNE purchase of ILEC ROW facilities, only \$3.20 in ROW compensation would be paid, while \$4.00 would be paid on every \$100 worth of retail revenue generated by the ILEC using those same ROW facilities. If a CLEC built its own network, of course, it too would pay \$4.00 for each \$100 of revenue generated from its own ROW facilities, rather than the \$3.20 its pays if it uses the ILEC's ROW facilities instead.

Thus, immunizing resellers and other users of ILEC ROW facilities from ROW compensation fees will inevitably lower the ROW compensation cost of non-facilities-based resale and UNE purchase relative to the alternative of facilities-based competition through a CLEC's use of its own ROW facilities. Ironically, this is precisely the opposite incentive that the NOI says the Commission wishes to create: to promote facilities-based competition. NOI at ¶¶ 4 and 72.

Moreover, the NOI's reliance on the "double payment" argument in Dallas II (NOI at ¶ 77) is misplaced. While it may be true that the particular AT&T franchise at issue in Dallas had this defect, that is no justification for immunizing resellers and other ROW lessees from ROW compensation requirements altogether. To the contrary, there is a simple solution: allow the reseller a credit against franchise fees owed in an amount equal to the franchise fees paid by the ILEC on its underlying "wholesale" price to the reseller. To return to the previous example, the reseller would owe $4.00 on each $100 of revenue, less a credit for the $3.20 in franchise fees paid by the ILEC on the wholesale price charged to the reseller, for a net franchise fee payment of $.80 by the reseller. This outcome -- which results in the same total ROW compensation regardless of whether the ILEC's ROW facilities are used by resellers or the ILEC -- is far more consistent with § 253(c)'s policy of non-discrimination and competitive neutrality than the approach taken by the Austin, Dallas and Prince George's County courts.

A second striking oddity in the NOI is its apparent fondness for the Prince George's County court's ruling that the County's 3% fee ROW imposed on an ILEC, Bell Atlantic, violates § 253(a). The NOI apparently overlooks that, in this respect, Prince George's County is at odds with the Commission's own ruling in Pittencrieff. There, the Commission upheld against § 253(a) challenge a 1.25% gross receipts fee imposed on wireless providers because the providers presented no evidence suggesting that the 1.25% fee had the prohibitory effect proscribed by § 253(a). 13 FCC Rcd. at 1752. Yet the Prince George's County court ruled that the County's 3% fee violated § 253(a) in the absence of any evidence supporting the far more counterintuitive notion that payment of the County's 3% fee would somehow have the effect of prohibiting a giant ILEC like Bell Atlantic from providing service in the County. Attachment A at 21-22.

In sum, the NOI's discussion of court precedent construing § 253 is industry-sided and incomplete. The Commission should learn two lessons from that: First, industry's "persistent assertions" should be taken with a very healthy dose of salt. Second, it is far too soon to be making any general or reliable pronouncements about how § 253 will be construed by the courts.

C. The Exponential Growth of CLECs and Fiber Deployment in the Past Three Years Refutes Any Suggestion That Local ROW Management and Compensation Requirements Have Had Any Adverse Effect on the Development of Facilities-Based Competition in Local Telecommunications Markets.

The NOI seeks to inquire into "management of public rights-of-way as it relates to the development of facilities-based competition."[13] NOI at ¶ 72. Other than oblique references to undescribed "claims" and "persistent assertions" by industry (at ¶¶ 72 & 79), however, the NOI cites to no facts or other evidence suggesting that local ROW management and compensation requirements have impeded facilities-based (or non-facilities-based) competition in any way.

This too the NLC finds disturbing. It is almost as if, having no evidence suggesting that ROW requirements have had any adverse affects on competition, the NOI is seeking it. While we assume the Commission did not intend to leave such an impression, it is difficult to see, given the inherently anecdotal nature of any information the record here is likely to yield and the jurisdictional limitations placed on the Commission by § 253 (see Part I(A) supra), what purpose the NOI's inquiry on this topic is intended to serve other than as a forum for industry to criticize ROW requirements.

[13] In the ROW portion of the NOI, the Commission repeatedly refers to "management of public rights-of-way," but only sporadically mentions the separate interest preserved by § 253(c): "fair and reasonable compensation" for use of ROW. E.g., id. at ¶¶ 72 & 73. This same oversight has disturbingly characterized some earlier Commission decisions discussing § 253(c), such as the dicta in TCI Cablevision of Oakland County, 12 FCC Rcd. 21396, 21441-42 (¶¶ 103 & 105-06)(1997), cited in the NOI (at ¶¶ 75 & 76) and typically recited by industry to courts in § 253 litigation. On its face, § 253(c) in fact preserves two separate local ROW interests: ROW management and ROW compensation. The Commission's persistent habit to date of lumping these two interests together as only ROW management not only is contrary to the language of the statute, but has also led to much confusion in the courts. Ironically, this sort of "Washington" weighting of the scales in construing § 253(c) was among the reasons that led Congress to deny the Commission jurisdiction over § 253(c) issues in the first place.

One conclusion, however, is inescapable. Local ROW management and compensation requirements clearly must not be having any significant adverse effect on the development of local facilities-based competition. The reason is that, by any of a variety of measures, local facilities-based competition has experienced explosive growth in the years since the 1996 Act. And this growth has occurred at the very same time that the supposed abuses which presumably are the subject of industry's "persistent assertions" were occurring.

Much of the data confirming this conclusion comes from the Commission itself. While, as the Commission has noted, consistent and comprehensive data is difficult to derive, what data is available unequivocally points to the conclusion that facilities-based local competitors such as CLECs and CAPs have experienced phenomenal growth since 1996, whether measured by amount of ROW facilities installed, total revenue, number of competitors or geographic scope of local markets entered.

In terms of local telecommunications service revenue, for instance, CLEC revenue growth has far outstripped ILEC revenue growth. CLEC and CAP revenue has more than tripled since 1996, while ILEC revenue growth has been fairly flat.[14]

For purposes of assessing the effect (if any) of local ROW requirements on facilities-based competition, fiber deployment is perhaps an even more apt indicator than revenue of the scope of new competitors' use of local ROW and the rapid growth in that use. And the evidence is unequivocal: Facilities-based competitors like CLECs and CAPs "are deploying fiber in their networks at a faster rate than are ILECs; they increased their amount of fiber in place almost five-fold from the end of 1995 to the end of 1998."[15]

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[14] See Industry Analysis Division, FCC Common Carrier Bureau, Telecommunications Industry Revenue: 1998 at 9, Table 3 (Sept. 1999).

[15] FCC Public Notice, "FCC Releases Study on Telephone Trends" (Sept. 17, 1999). Accord J. Kranshaar, Fiber Deployment Update End of Year 1998 at Tables 10 and 14 (Sept. 9, 1999) (listing ILEC and CLEC fiber deployment in miles since 1990).

A five-fold increase CLEC fiber deployment in the last three years powerfully indicates that local ROW management and compensation requirements have been no impediment to local facilities-based competition. Indeed, it is difficult to believe that capital and construction capacity constraints would have permitted any significant growth beyond a 500% increase in CLEC fiber deployment over three years, even if there were no local ROW management and compensation requirements at all. Moreover, that CLECs have been deploying ROW fiber capacity at a far faster pace than ILECs refutes any suggestion that ROW requirements have had any discriminatory effect on new entrants.

Further evidence confirming this conclusion can be found in the Commission's recently issued Local Competition Report.[16] There, the Commission noted that not only are CLECs deploying fiber "at a faster rate than ILECs," but also "now have at least 16% of the total fiber optic system capacity potentially available to carry calls within local markets."[17] This 16% figure far exceeds CLECs' 2.4% share of local service revenues.[18] Since CLECs are deploying fiber capacity far more rapidly than ILECs, and CLEC ROW fiber capacity represents a far larger share of total local transmission capacity than CLEC revenue, the conclusion should be obvious: Local ROW management and compensation requirements are not hindering CLECs' use of ROW, either generally or in terms of CLEC ROW use relative to ILEC ROW use.

The Local Competition Report also reveals that facilities-based CLEC competition is geographically widespread and increasing. By June of this year, facilities-based CLECs were present in all 50 states, "and in all but 18 of the nation's [LATAs]."[19] Such widespread presence

[16] Industry Analysis Division, FCC Common Carrier Bureau, Local Competition: August, 1999 (Aug. 31, 1999) ("Local Competition Report").

[17] Id. at 2 & Charts 2.1 and 2.2.

[18] Id. at 1.

[19] Id. at 2.

of facilities-based competition certainly cuts strongly against any suggestion that local ROW requirements have impeded facilities-based competition.[20]

Finally, the Local Competition Report's conclusion that facilities-based competitors tend to enter in greater numbers in more dense, major metropolitan areas (id. at 5) lends further support to the conclusion that local ROW requirements do not impede competition. This is so for two reasons. First, it demonstrates that the amount of facilities-based entry is determined first and foremost by market demographic and density factors unrelated to varying local ROW requirements: More dense metropolitan areas characterized by higher volume commercial customers provide a more lucrative potential revenue base capable of supporting multiple providers at lower per-customer cost. Id. at 5.

Second, it is interesting to note that virtually all of the reported § 253 cases to date have involved challenges to ROW requirements imposed by local governments in just such major metropolitan areas.[21] These major metropolitan areas are also, of course, precisely the areas where the value of local ROW, the amount of congestion in the ROW, and the costs of ROW acquisition, maintenance and management are the highest. Thus, local ROW requirements tend to be more substantial and, from a carrier's viewpoint, more costly in these areas.

Yet facilities-based entry has been the most intensive in precisely those areas where ROW requirements are the most demanding. CLECs' actions in this regard speak louder than their "persistent assertions" to the Commission: Although CLECs are fond of complaining about

[20] To be sure, the Local Competition Report also points out that ILECs still control over 90% of the local market. Id. at 1. But given the recent advent of local facilities-based competition, that should hardly be surprising. For purposes of assessing whether local ROW requirements have impeded competition, the relevant criteria should be the pace of growth of facilities-based competition, not its absolute market share. And by that measure, the data uniformly support the conclusion that local ROW requirements have been no obstacle to the growth of facilities-based competition.

[21] See, e.g., Dallas; Austin; Dearborn; Prince George's County; Omnipoint (New York, New York); Cablevision of Boston v. Public Improvement Commission of the City of Boston, 1999 WL 632203 (1st Cir. Aug. 25, 1999) (Boston).

local ROW requirements, they have in fact entered in far greater numbers in precisely those areas that have the most demanding ROW requirements. Once again, the conclusion is clear: Market demographics are far and away the primary driver of facilities-based competition, and local ROW requirements have no discernable effect at all on such competition.

II. THE NOI PROPERLY REBUFFS THE WIRELESS INDUSTRY'S ATTACK ON STATE AND LOCAL TAXES, WHICH IS NOTHING MORE THAN A PLEA FOR TAX FAVORITISM BY AN INDUSTRY WHOSE EXPLOSIVE GROWTH BELIES ANY CLAIM OF ADVERSE TAX EFFECTS.

A. The NOI Properly Recognizes the Vital Function of State and Local Taxes and the Extremely Limited Nature of Commission Authority Over Taxes.

NLC applauds the NOI's recognition that "[t]he assessment and collection of taxes and other fees is a vital function of State and local governments, indeed a necessary one to support all of those governments' other functions." NOI at ¶ 81. Among the critical governmental functions performed by cities are, of course, police protection and law enforcement, fire protection and other public safety functions, public schools and education, public health, public transportation, public housing, and economic development.

The public's demands for these essential services, as well as the costs of providing them, are increasing. This, in turn, places increasing fiscal demands on municipalities. The Commission can rest assured that, in confronting these demands, local governments share its goal that "tax burdens on telecommunications providers are imposed fairly so as not to impede competition." Id. at ¶ 82. Local governments certainly want their residents to receive the benefits of competition. More generally, local governments have long recognized basic principles of tax equity. Imposition of inequitable tax burdens that might impede competition -- whether for telecommunications services or any other goods and services that a local government's residents may purchase -- would be counterproductive, not only from the standpoint of depriving consumers of the benefits of competition, but also from the standpoint of maximizing tax revenues: Competition typically stimulates demand and economic growth, which in turn usually results in greater tax revenues.

In our system of federalism, however, how each local taxing authority balances the fiscal demands placed upon it against taxpayers' understandable distaste for taxes is left to democratically-elected legislatures -- in the case of local governments, elected councils and boards -- not to distant, unelected federal agencies like the Commission. NLC is therefore gratified with the NOI's acknowledgement that the Commission's "authority to preempt State and local tax policies is extremely limited." Id. at ¶ 84.

As the NOI notes, § 601(c)(2) of the 1996 Act[22] provides that, subject to three exceptions, nothing in the 1996 Act authorizes the preemption of any state or local taxes.[23] Since § 253 is not included in the exceptions to the Act's broad tax savings clause, it follows that § 253 provides no authority for the Commission to preempt state or local taxes on telecommunications providers.

Nor can 47 U.S.C. § 332(c)(3), added by the Omnibus Budget Reconciliation Act of 1993, be construed to grant the Commission any authority to preempt any state or local taxes imposed on wireless providers. To the contrary, the Conference Report accompanying the 1993 Act contains its own tax savings provision, clarifying that § 332(c)(3) was not intended to alter or affect the authority of state or local governments to tax CMRS providers.[24]

Accordingly, we are pleased with the Commission's "recognition of the limits of [its] expertise" in the area of state and local taxes, and its "respect for principles of federalism." NOI

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[22] Codified as a note to 47 U.S.C. § 152.

[23] The three exceptions are (1) the franchise fee provision of the Cable Act, 47 U.S.C. § 542; (2) the OVS fee provision in 47 U.S.C. § 573(c); and (3) the preemption of local DBS taxes in § 602 of the 1996 Act. Id. None of these exceptions seems applicable to the issues raised in the NOI.

[24] H.R. Conf. Report No. 213, 103d Cong., 1st Sess. at 486-87 reprinted in 1993 U.S.C.A.A.N. 1088, 1175-76.

at ¶ 84. The Commission should maintain that respect, for as we now show, there is no need for federal action in this area, and industry claims to contrary are baseless.

B. Virtually All of the Taxes About Which the Wireless Industry Complains Are Generally Applicable, and the Commission Should Therefore Ignore the Wireless Industry's Plea for Favoritism.

As NOI properly observes, "[v]irtually all businesses are subject to a wide array of State and local taxes, and there is no reason that telecommunications businesses should be any exception." NOI at ¶ 81. Yet even a cursory examination of the taxes about which industry complains reveals them to be generally applicable taxes. That means, of course, that what the industry actually seeks is to be an "exception" to the "wide array of State and local taxes" that all other businesses face. In other words, what industry really wants is tax favoritism. The Commission should roundly reject such self-serving pleas.

The NOI refers (at ¶¶ 82-83) to various allegations by the wireless industry of supposedly unfair state or local taxes. These allegations appear to stem primarily from a petition filed by CTIA in 1996 (and denied in the NOI),[25] and a subsequent 1998 filing by PCIA.[26]

The Oregon, West Virginia and Kentucky taxes cited in the CTIA Petition are, based on CTIA's own description, property taxes. CTIA Petition, Attach. at 2-3 & nn. 3, 5, and 6. In other words, the taxes about which CTIA complains are generally applicable taxes. Moreover, CTIA's own description reveals that industry already has more than adequate remedies to resolve disputes over tax assessment and property valuation that will inevitably arise between taxpayers and taxing authorities. Id. at nn. 5 and 6.

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[25] Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of Commission's Rules to Preempt State and Local Imposition of Discriminatory and/or Excessive Taxes and Assessments, filed Sept. 26, 1996 ("CTIA Petition").

[26] M. Katz and J. Hayes, "Unintended Consequences: Public Policy and Wireless Competition" (Oct. 1, 1998), filed as an Attachment to Letter from Mary McDermott, Chief of Staff and Senior Vice President, Government Relations, Personal Communications Industry Association to John Berresford, Industry Analysis Division, Common Carrier Bureau in CC Docket No. 98-146 (dated Nov. 12, 1998)("PCIA Study").

Similarly, CTIA describes the Montgomery County tax about which it complains as an extension of "a pre-existing telephone tax to CMRS customers." Id. at n. 2. How the extension of pre-existing telephone taxes to wireless providers would be discriminatory, CTIA does not explain. Attacking the extension of existing telephone taxes to wireless providers is also at odds with the PCIA Study's view that wireless service is potentially competitive with wireline service. PCIA Study at 13-16. If wireless service does compete with local wireline service, it is difficult to see why it should not be subject to the same taxes as wireline service. What the wireless industry really appears to want is discriminatorily <u>favorable</u> treatment for itself, vis-à-vis not only other businesses generally, but also its wireline competitors in particular.

The PCIA Study succeeds only in confirming industry's improper aim. As far as the NLC can tell, <u>all</u> of the local taxes listed in the PCIA Study's "case studies" are generally applicable taxes.[27] The local taxes cited are utility taxes, business license fees, sales and use taxes, gross receipts taxes, property taxes and corporate income taxes. PCIA Study at 20-29. <u>None</u> of these taxes singles out wireless service providers.

As far as the Commission is concerned, that should end the need for further inquiry. That the wireless industry believes that the state and local taxes it pays are too high should hardly be surprising,[28] but it is also irrelevant. No doubt other non-telecommunications businesses share the wireless industry's preference for fewer and lower taxes. But Congress has not empowered

[27] The PCIA Study also includes various federal, state and local universal service, E911, and state utility commission fees. These, of course, are not taxes, and in any event, do not implicate local taxing authority in any way. We note, however, that these fees appear to apply to all telecommunications service providers, wireline and wireless alike, so it is difficult to see how PCIA's complaints about them can be anything more than a plea for favoritism vis-à-vis wireline providers.

[28] We note, however, that the PCIA Study appears to overstate the scope of some of the taxes it describes. For example, CMRS providers pay the 10% Los Angeles public utility tax only on the flat-rate portion of their billings to customers; all variable rate, per-minute charges are excluded from the tax. CMRS providers therefore pay Los Angeles considerably less than 10% of their gross revenues in City tax.

the Commission to become some sort of roving, unelected anti-tax crusader for the special benefit of the telecommunications industry. And the Commission certainly should not be in the business of granting the wireless industry (or any other sector of the telecommunications industry) special immunities from state and local tax laws. Yet such blatantly improper favoritism is precisely what the CTIA Petition and PCIA Study seek.

C. The Wireless Industry's Claims Are Belied by the Enormous Growth It Has Enjoyed.

If, as the wireless industry asserts, state and local taxes were such an obstacle to lower prices and increased demand for wireless services, one would expect to see some evidence supporting that assertion. But there is none. To the contrary, the evidence -- from both the Commission and the wireless industry itself -- is that wireless services and wireless providers are enjoying phenomenal growth and, and the same time, prices for wireless services are decreasing.

We begin with the Commission's CMRS Fourth Report.[29] As the Commission found there, the mobile wireless sector's share of total telecommunications industry revenue has continued to increase, from 12.2% of industry revenues in 1996 to 14.3% in 1997.[30] In 1998 alone, total domestic subscribership of CMRS products grew by 17%, and the CMRS industry added over 18 million new subscribers for the fourth straight year.[31]

Moreover, this growth has translated into increased competition in terms of new entrants and lower prices. Thus, the CMRS Fourth Report estimates that approximately 74 percent of the nation's population enjoys the benefit of at least 5 different competitive mobile service providers

[29] Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Fourth Report, FCC 99-136 (rel. June 24, 1999) ("CMRS Fourth Report").

[30] Id. at 5.

[31] Id. at 6.

in their areas, up from 54 percent in 1997.[32] During the same period, average prices for wireless service decreased substantially, "continuing the trend of the past several years."[33]

The CMRS Fourth Report also reveals the same pattern concerning the geographic distribution of wireless competitve entry and growth as the FCC's Local Competition Report found in the case of wireline CLEC entry and growth: "new entrants have been concentrating their deployment efforts on the more populous geographic markets,"[34] and the "most aggressive price competition" has been occurring for "high-end customers."[35] That growth in wireless service deployment and competition has been most intense in major metropolitan areas disproves the PCIA Study's theory about the supposedly demand-dampening effects of state and local taxes. Each of the PCIA Study's six "case studies" involves a major metropolitan area. PCIA Study at 20-29. In other words, each of the "case studies" of supposedly excessive taxes depicts a locality that, according to the CMRS Fourth Report, is experiencing the greatest benefits of competitive entry and falling prices. Again, the conclusion should be obvious: Market demographic factors are the primary determinants of wireless service growth and competition, not state or local taxes.

Perhaps the best refutation of the wireless industry's complaints about the supposedly deleterious effects of state and local taxes is the industry itself. When industry speaks in any forum other than its petitions to the Commission seeking special shelter from state or local taxes, its message trumpets "astonishing" growth. CTIA's own website, for instance, proudly proclaims 25 percent growth in wireless subscribers in one year, from over 55 million

[32] Id. at 6-7, 18-20.

[33] Id. at 20-23.

[34] Id. at 20.

[35] Id. at 22.

subscribers in 1997 to over 69 million subscribers in 1998.[36] CTIA also reported a 7.8 percent decline in the average monthly subscriber bill in 1998, while industry revenues grew by 20 percent in 1998 to over $34 billion.[37]

NLC does not point out these figures to criticize the wireless industry. On the contrary, the industry should be proud of its phenomenal growth and success, as well as its declining subscriber prices. But the data simply cannot be squared with industry's assertions that state and local taxes are somehow inhibiting its growth or its ability to compete.

Instead, the data suggest that industry's complaints to the Commission are nothing more than the pleas of a very successful industry for preferential immunity from state and local taxes that other business do not enjoy. That is a plea the Commission must reject.

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[36] "Wireless Industry Posts 'Astonishing' Subscriber Increase 13,897,028 New Subscribers in 1998," http://www.wow-com/news/ctiapress (April 1, 1999).

[37] Id.

CONCLUSION

There is no evidence suggesting that local ROW requirements or state and local taxes are having any adverse effect at all on the growth of facilities-based competition. Moreover, the Commission's authority in these areas is, at best, exceedingly limited. Accordingly, the Commission should reject industry invitations to intrude into local ROW requirements and taxes.

Respectfully submitted,

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ATTACHMENT A

NLC Amicus Brief in Bell Atlantic v. Prince George's County, No. 99-1784 (4th Cir.)

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